SUPREME COURT, U. S.

FILED
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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 11.

NATHANIEL HARRIS,
Petitioner,
v.
UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITION FOR REHEARING.

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Petitioner prays that this Court grant rehearing of its decision of March 2, 1959, affirming the judgment of the Court of Appeals and to grant him a rehearing for the following reasons.

REASONS FOR GRANTING A REHEARING.

The court finds that in order to take advantage of the presumption of §4704(a) it is necessary to prove the requirement that the narcotic was unstamped as well as in

defendant's possession while in order to use the § 174 presumption, possession alone is necessary. But this conclusion overlooks the fact that if a narcotic is stamped, it is legally possessed and it would then be irrational to presume a violation. The absence of a stamp shows the illegal character of illicit narcotics. Conversely, the presence of a stamp would identify the narcotics as legal. Therefore, both presumptions may only arise from possession of an unstamped package. The court also concludes there was direct evidence of an unstamped package from which a purchase had been made. But under the first count all three defendants were charged with purchasing the narcotics from an unknown person. They were not charged with purchasing narcotics from each other. There is no elemental requirement that narcotics remain in the original stamped package except upon purchase, sale, dispensation or distribution. The jury could therefore not determine from the narcotics introduced in evidence whether or not such narcotics were purchased from a stamped package.

We think that the difference between the two counts are merely verbal without a practical significance. There is no factual distinction between possession and receipt and concealment. Furthermore, heroin may not be legally imported and there are no stamped packages containing heroin.

We have just demonstrated that the presumptions are applicable only if the narcotics are unstamped. The **Blockburger** test is thus applicable but in effect it has been overruled sub silentio. The statement of the rule is as follows: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." The court's opinion has analyzed Blockburger

and has attempted to show that there are "two distinct statutory provisions" involved. But **Blockburger** only has application if the same "act or transaction" constitutes a violation of "two distinct statutory provisions."

We believe the court is in error in concluding that in the **Gore** case resort to the statutory presumptions were made to establish the counts other than the written order violation. The evidence presented was that a federal narcotics agent went to the defendant's apartment and arranged a purchase of narcotics and that "petitioner left the apartment and returned about an hour later and delivered the narcotics to the agent in an unstamped envelope." Govt. Br., **Gore v. United States**, p. 4. Thus, the direct evidence showed a sale from an unstamped package as well as the transportation of the narcotics.

Certificate of Counsel.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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